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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PATRICK COUSSENS AND MARY COUSSENS

PETITIONERS

VS.

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA AFL-CIO, A VOLUNTARY UNINCORPORATED LABOR UNION, ET AL

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS SIXTH CIRCUIT

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202 pp

QUESTIONS PRESENTED

Does the fact that Defendant-Appellants received no legally sufficient notice of the taking of their depositions, which were noticed to be taken after they had filed their garnishment disclosures, and further received no legally sufficient notice of a Default Judgment issued and entered against them for failure to attend the depositions which subsequently lead to the garnishment of their personal bank account, violate their Fifth Amendment and Fourteenth Amendment, Constitutional guarantee against being deprived of their property without due process of law?

Does the failure of the Plaintiff-Appellees to comply with the technical requirements of both Michigan General Court Rule G.C.R. 1963, 520.2(2) and Federal Rule of Civil Procedure 55(b)(2) requiring written notification of the application for judgment be served upon the Defendant-Appellants prior to a Default Judgment being entered against the Defendant-Appellants which subsequently lead to the garnishing of their personal bank account, deprive them of their Fifth Amendment and Fourteenth Amendment Constitutional guarantee against being deprived of their property without due process of law?

Does the fact that a Writ of Garnishment issued by the United States District Court for the Eastern District of Michigan, Southern Division garnishing the funds in the Defendant-Appellants' personal bank account located in the State of Texas and outside both the personal and subject matter jurisdiction of said Court, constitute a violation of the Defendant-Appellants Fifth and Fourteenth Amendment guarantees against depriving them of their property without the due process of law?

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LIST OF PARTIES

1. Carpenters District Council of Detroit
2. United Brotherhood of Carpenters and Joiners of America
3. AFL-CIO, a voluntary unincorporated Labor Union
4. Detroit Carpenters Fringe Benefit Funds, a Michigan trust fund
5. Traig Roofing, Inc.
6. Patrick Coussens
7. Mary Coussens
8. Katy National Bank

JURISDICTION

The United States Court of Appeals Sixth Circuit rendered its decision affirming the decision of the United States District Court for the Eastern District of Michigan Southern Division on May 26, 1983. Defendant-Appellants timely filed their Petition for Rehearing with United States Court of Appeals, Sixth Circuit. Defendant-Appellants' Petition for Rehearing was denied by said Court on January 18, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions, Statutes, Court Rules, and Rules of Civil Porcedure Involved in this Case

1. U.S. Constitutional Amendment V - full text contained in appendix at A-72.
2. U.S. Constitutional Amendment XIV - full text contained in Appendix at A-73.
3. Michigan General Court Rules (MGCR) 1963, 520. - full text contained in Appendix at A-78.
4. Michigan General Court Rules (MGCR) 1963, 528 - full text contained in Appendix at A-87.
5. Michigan General Court Rules (MGCR) 1963, 313. - full text contained in Appendix at A-92.

6. Federal Rules of Civil Procedure 37 - full text contained in Appendix at A-100.

7. Federal Rules of Civil Procedure - 55 full text contained in Appendix at A-108.

8. Federal Rules of Civil Procedure 60 - full text contained in Appendix at A-112.

9. MCLA 600.4011; MSA 27A.4011 - full text contained in Appendix at A-116.

STATEMENT OF THE CASE

Judgment was obtained by the Plaintiffs against Traig Roofing, Inc., on the 12th day of October, 1976. On May 19, 1977, the District Court issued Writs of Garnishment against Patrick Coussens and Mary Coussens, which were personally served by the United States Marshal on May 20, 1977. Thereafter, said Garnishee Defendants filed disclosures indicating no indebtedness to the Plaintiff. Plaintiffs then attempted to serve notice of taking depositions of said Garnishee Defendants by serving attorney Irving A. August. Nowhere in the record does it appear that attorney August ever represented or became attorney of record for said Garnishee Defendants. On June 2, 1977, Mr.

August notified Plaintiffs that he did not represent the Garnishee Defendants. Plaintiff then allegedly forwarded copies of the notice of taking depositions to Patrick Coussens and Mary Coussens at 8300 Packton, Utica, Michigan 48087, by ordinary mail. Patrick Coussens and Mary Coussens deny receiving such notice. The Coussens permanently moved their residence from the State of Michigan on or about June 17, 1977, to the State of Texas. Plaintiff was apprised of such fact on June 23, 1977, when Plaintiff's attorney attempted to telephone Garnishee Defendants at all the Garnishee Defendants' business and residence telephones and was advised that they had been permanently disconnected.

Plaintiff's attorney then telephoned attorney August, who advised once again that he did not represent any of the Garnishee Defendants and that Patrick Coussens and Mary Coussens had permanently left the State of Michigan and resided in the State of Texas. (Affidavit of Coleman E. Kline in Support of Ex Parte Motion for Order Compelling Taking of Depositions and Default Judgment.) In spite of such knowledge, Plaintiff filed an Ex Parte Motion for Order Compelling Taking of Depositions and Default Judgment with Brief and Affidavit and attempted to serve the same on Garnishee Defendants Patrick Coussens and Mary Coussens at 8300 Packton, by certified mail, return receipt requested. A Supplemental

Brief was then filed, but apparently no attempt was made to serve the same upon the Garnishee Defendants. Thereafter, the Court rendered its opinion and entered an Order Compelling the Taking of Depositions, a copy of which was once again attempted to be served on the Garnishee Defendants Patrick Coussens and Mary Coussens, by certified mail at 8300 packton, Utica, Michigan, an address which the Plaintiff well knew they had moved from three (3) months earlier. Plaintiffs then filed an Ex Parte Motion for Default Judgment, based upon Garnishee Defendants' failure to appear pursuant to the order and in the supporting affidavit thereon, indicated that:

"All of the certified mailings

were returned to the deponent by the United States Post Office on October 3, 1977, marked by the Post Office "return to senders; moved, left no address."

In the same affidavit, Plaintiff's counsel interlineated, apparently at the request of the Court, "that he knows of no other or more recent addresses". This appears to contradict the information given by Plaintiff's counsel only four (4) months earlier to the U.S. Marshal, showing an alternate address for service at 11400 22 Mile Road, Utica, Michigan as evidenced by the U.S. Marshal's return on the Writs of Garnishment filed herein. Once again, the Ex Parte Motion for Default Judgment and Affidavit and Brief in

Support thereof were attempted to be served by certified mail on Patrick Coussens and Mary Coussens at 8300 Packton, even though Plaintiff now knew that they had not lived at that address for almost four (4) months. Said service was apparently made on the same day that Plaintiff's counsel appeared and obtained an Order for Default Judgment, which he also attempted to serve on the Coussens in the same manner.

Thereafter, even though having claimed not to know the Coussens whereabouts and to have made every reasonable effort to locate the Coussens, on May 19, 1981, the Plaintiffs caused to be issued a Writ of Garnishment in this cause which was

served upon Garnishee Defendant Katy National Bank. The Writ was not served upon Garnishee Defendants Coussens. Defendants Coussens were not subject to the jurisdiction of the issuing Court and neither were the funds garnished, both being located in Katy, Harris County, Texas. Garnishee Defendant Katy National Bank answered and subsequently tendered the funds into the registry of the Court praying for relief and discharge.

After a non-evidentiary hearing, the Honorable Horace W. Gilmore denied the Garnishee Defendants Coussens' Motion to Set Aside Default Judgment and granted Plaintiffs' Petition for Release and Payment of Funds.

REASONS FOR GRANTING THE WRIT

I.

This case involves important due process questions which should be resolved by this Court. Practitioners involved in the general civil practice routinely handle collection matters and represent both creditors and debtors alike and become involved in the problems of notifying parties, garnishing out of state bank accounts, and scheduling debtors examinations. This Court has dealt to a large extent with pre-judgment procedural due process questions affecting the above areas but there remains a void in post-judgment due process jurisprudence in these matters. This case provides the Court with the opportunity to resolve

and clarify due process questions occuring after judgment.

II.

Moreover, the Court below has erred in its decision affirming the Trial Court's overruling of the Defendant-Appellants' Motion to Set Aside Default Judgment taken against the Defendant-Appellants. The United States Court of Appeals, Sixth Circuit, has misconstrued both the statutes and Court rules of the State of Michigan, as well as the Federal Rules of Civil Procedure relating to default judgments, sanctions applied for failure to attend depositions and garnishment. The result of this misconstruance and/or misapplication of law has been an unequitable, gross and

manifest injustice to Defendant-Appellants. The United States Court of Appeals, Sixth Circuit has applied the above stated rules and statutes both State and Federal in such a manner as to deprive the Defendant-Appellants of their property without due process of law in violation of the guarantees provided them by the Fifth and Fourteenth Amendments to the United States Constitution.

III.

The United States Court of Appeals, Sixth Circuit has decided the federal questions involved in this case in such a manner as they conflict with prior applicable rulings of this Court.

ARGUMENT ON POINT i

The Trial Court abused its discretion when it entered a Default Judgment against the Defendant-Appellants and subsequently refused to grant the Defendant-Appellants' Motion to Set Aside Default Judgment. The test under both Michigan law and Federal law for setting aside default judgment is good cause shown. Michigan General Court Rule 520 states:

> "4. Setting Aside Default Judgment. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 528."
> MGCR 1963, 520.4

Federal Rule of Civil Procedure 55 indicates:

> "For good cause shown, the Court may set aside entry of default and, if a judgment by default

> has been entered, may likewise set it aside in accordance with Rule 60(b)."

In this case, the Defendant-Appellants showed to both the trial court and the Court of Appeals that they did not receive notice of taking of the depositions in question for they had moved from the residence where attorneys for the Plaintiff-Appellees were sending the notices to take depositions. The attorneys for the Plaintiff-Appellees even after realizing that the address they were sending all notices to in the matter was incorrect, and had been so for well over four (4) months, continued sending the notices to take depositions as well as the Ex Parte Motion for Order Compelling Taking of Depositions and

Default Judgment, Brief, Affidavit in Support of such Motion, and finally the Ex Parte Motion for Default Judgment and Affidavit in Support of such to the same address. This was done despite the fact that the attorneys for the Plaintiff-Appellees had actual notice that the address they were using for service of process was incorrect and ineffective for purposes of providing the Defendant-Appellants with notice as to either the depositions they had scheduled or the Default Judgment they obtained.

The Supreme Court of the State of Michigan has indicated that when service of process has not been made and thus notice of Default Judgment remains unknown to the Defendant, it is

grounds for vacating the Default Judgment. C.R. Mechanical, Inc. v. Temp-San Corp., 394 Mich. 102; 220 N.W. 2d 315 (1974). The Michigan Court of Appeals has also indicated that lack of notice justifies the setting aside of a Default Judgment. In the case of National Car Rental v. S & D Leasing, Inc., 89 Mich. App. 364, 280 N.W. 2d 529 (1979) the Court held that lack of notice is a meritorious defense and sufficient to set aside a default judgment. The case suggested that the showing of no actual notice is a meritorious defense supporting the setting aside of a Default Judgment. In that case the Defenant filed a counterclaim against the Plaintiff corporation. The Counterclaim was served upon the attor-

ney for the Plaintiff who failed to advise his corporate client of the counterclaim. After the Plaintiff became aware of the Defendant's counterclaim, the Plaintiff moved to have the Default Judgment set aside asserting as grounds therefor that he did not receive actual notice. The Court held this was a meritorious defense and granted the motion. These cases when considered together with the case of Okras v. Myslakowski, 67 Mich. App. 397, 241 N.W. 2d 223 (1976) certainly meet the Michigan standard of "good cause" as cited in MGCR 1963 520.4, 15, supra. The Okras case stated that the good cause required to set aside a Default Judgment includes a showing of substantial defects or irre-

gularity in proceedings upon which default is based, reasonable excuse for failure to comply with the requirements creating the default or some other reason showing that manifest injustice would result if the Default Judgment were allowed to stand. The Defendant-Appellants have certainly satisfied these "good cause" standards by showing that they never received actual notice of the depositions to be taken, the motion compelling them to attend the depositions or the Default Judgment entered against them for their failure to attend the depositions. Non-receipt of actual notice is a substantial defect in the proceedings, is a reasonable excuse for failure to comply with the requirements creating

the default and has caused manifest injustice to the Defendant-Appellants.

Federal Rules of Civil Procedure 55(c) and Federal case law add further support to the Defendant-Appellants position. Federal Rule of Civil Procedure 55(c) states:

> "For good cause shown the court may set aside an entry of default and, if a judgement by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

The case of Allen v. Jackson, (1979 D.C. Tex.) 82 F.R.D. 355, proffered as follows:

> "Courts are willing to recognize the justice of vacating default judgments in cases wherein the Defendant was without actual knowledge of service of process against him."

The Federal Courts also recognize that Default Judgments are not favored by

the law and although discretionary with court all reasonable doubts should be resolved in favor of setting aside the default so that a determination may be made on the merits of the case Securities and Exchange Commission v. Vogel, (1970 D.C. NY), 49 F.R.D. 297, Olopari v. O'Leary, (1957 D.C. Pa), 154 F. Supp. 78.

In addition to M.G.C.R. 1963, 520 the Michigan Court Rules also provides an alternative method to obtain relief from default jugments. M.G.C.R. 1963, 528 states:

> "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons... (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time,

> and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken..."

The Defendant-Appellants alleged at both the trial court level and in their appeal to the United States Court of Appeals, Sixth Circuit, that their Motion to Set Aside Default should be granted as they received no actual notice of the notice to take depositions, Motion and Order Compelling them to submit to depositions or the Default Judgment entered against them for failing to attend the depositions. The Defendant-Appellants asserted then and continue to assert that the non-receipt of actual notice of any of the above indicated notices, orders, motions and entries in this cause qualifies them

pursuant to M.G.C.R. 1963, 528 (6) 22, supra. The Defendant-Appellants position is again supported by Michigan case law in the case of Olender v. Quality House Bakery, 48 Mich. App. 647, 211 N.W. 2d 213, (1973). In that case the Michigan Court of Appeals set aside a Default Judgment against a garnishee defendant after the four (4) month period prescribed by M.G.C.R. 1963, 520 had expired. The Court in that case applied the standard of M.G.C.R. 1963, 528.3(6) "...any other reason justifying relief from the operation of the judgment." This case appears to be directly in point as it was the Court's reasoning that the Default Judgment in this matter should be set aside because the garnishee

defendant had been precluded from moving to set aside the Default Judgment until after the four (4) month period, due to the lack of any notice of the proceeding. In reaching this decision the Court relied upon the case of McDonough v. General Motors Corp., 6 Mich. App. 239; 148 N.W. 2d 911 (1967). In the McDonough case the Court indicated that it was the purpose of M.G.C.R. 1963, 528.3(6) to free Courts from the fetters of a set of specifically delineated grounds for relieving parties from default judgments whenever manifest injustice or an unconscionable result flows therefrom.

The Defendant-Appellants assert that pursuant to the dicta of the

Olender case, 24, supra, that the lack of any notice of the proceedings against them, and the fact that they moved to set aside the Default Judgment taken against them as soon as they became aware of it, when considered with the manifest injustice of the taking of their personal bank account without notice or prior hearing, are grounds enough to set aside the Default Jugment taken against them.

The Federal statutes and case law further buttress the Defendant-Appellants cause. Federal Rule of Civil Procedure 60(b) is identical to M.G.C.R. 1963, 528.3 22, supra, and need not be restated here.

The Federal District Court in a case similar to the one at hand,

decided that where a Plaintiff had failed to answer interrogatories and admissions, but was not advised or notified that a Motion for Default Judgment, Notice of Motion for Default Judgment, or order had been submitted to the Court by the Defendant. Moreover, the Plaintiff was not notified as to the granting of the Motion for Default Judgment, or the entry of Default and for these reasons a Default Judgment or entry of default count not stand. In this case, neither the Plaintiff nor any one representing the Plaintiff appeared at any of the hearings. Neither the Plaintiff nor his counsel had actual notice of any of the hearings, motions, or the granting of the Default Judgment. However, when

the Plaintiff became aware of the same, he filed a Motion to Set Aside the Default Judgment and further alleged valid defenses to the Defendants' counterclaims. The Court found there was "good cause" for setting aside the default entry and if a judgment had been entered with regard to the default, such judgment would be void. The scenario of the above cited case is similar to the instant case with the exception of the parties being reversed. In the present cause the Defendant-Appellants were not notified and did not receive actual notice of the default proceedings commenced against them and eventually the Default Judgment entered against them. However, the Trial Court in this cause

failed to find "good cause" as required by both the Michigan and Federal Rules and refused to grant the Defendant-Appellants Motion to Set Aside the Default Judgment. This decision was affirmed by the United States Court of Appeals, Sixth Circuit. We feel the Trial Court abused its discretion and the United States Court of Appeals, Sixth Circuit erred in its affirmation of the Trial Court's decision that the lack of actual notice of the default proceedings and Default Judgment is insufficient to establish "good cause" to support a Defendant-Appellants Motion to Set Aside Default Judgment.

The attorneys for the Plaintiff-Appellees obtained the Default Judgment against the

Defendant-Appellants as a sanction for failing to abide by the Trial Court's Order Compelling the Defendant-Appellants' attendance at a deposition. This Order Compelling Attendance was served by mailing the same to an address the attorneys for the Plaintiff-Appellees knew was no longer a correct address for the Defendant-Appellants. Although both the Michigan General Court Rules and the Federal Rules of Civil Procedure provide for such sanction, Michigan and Federal case law set stringent guide-lines which must be followed before a dismissal or default judgment may be granted and/or entered as a sanction. Moreover, both the Michigan General Court Rule (MGCR) 1963, 313.4

and the Federal Rule of Civil Procedure, Fed. R. Civ. P. 37(d) demand a showing of willfulness on the part of one failing to obey a discovery order of the Court.

The Michigan Federal case of Backos v. U.S., (1979 D.C. Mich.) 82 F.R.D. 743 suggested that a party's failure to comply with a discovery order must be willful in order to secure a dismissal or Default Judgment. This case required the element of willfulness be present to obtain a Default Judgment or dismissal. Another Michigan case which better lends itself to the present cause is MacArthur Patton Christian Ass'n. v. Farm Bureau Ins. Group, 403 Mich. 474; 270 N.W. 2d 101 (1978).

This case also stands for the proposi-
ton that willfulness must be shown
before the Court will invoke the
drastic sanction of dismissal and, by
analogy, entry of a Default Judgment.
In this case the Plaintiff's agent who
was scheduled to appear at a deposition
and was properly notified by
Defendant's attorney of the scheduled
deposition left the area to attend his
son's wedding. The agent failed to
advise the Plaintiffs' attorney of this
fact and further failed to attend the
deposition. The Trial Court
as a sanction for the agent's failure
to attend the deposition dismissed the
Plaintiffs' case. This case was
appealed and the Michigan Supreme Court
ultimately held that the showing of

willfulness on the part of the agent was ambiguous at best, and further reversed the lower court citing further that dismissal of the case was too drastic a sanction. Jack's Factory Outlet v. Pontiac State Bank, 95 Mich. App. 174, 290 N.W. 2d 114, (1980), defined what is meant by "willful". In that case the Michigan Court of Appeals suggested that a party's failure to comply with a court order for discovery is willful if it is conscious or intentional and not accidental or involuntary.

Federal case law offers additional authority aiding the Defendant-Appellants' position. The Federal Courts have held that the ultimate sanction of default for failure to

comply with a discovery order cannot be administered absent a showing of willful failure to disclose information or to attend depositions. State of Ohio v. Crofters, Inc., (1977 D.C. Colo) 75 F.R.D. 12, affirmed 570 F. 2d 1370, certiorari denied 439 U.S. 601; 69 S.Ct. 384, 93 L.Ed. 266, Ali Akber v. Philco Intern. Corp.; (D.C. NY 1950) 10 F.R.D. 278. In the case of Professional Hockey Antitrust Litigation (1976 CA Pa.) 531 F. 2d 1188, reversed on other grounds 427 U.S. 639, 96 S.Ct. 2778, 49 L.Ed. 2d 158 rehearing denied 429 U.S. 874, 97 S.Ct. 197, 50 L.Ed. 2d 158 it was indicated that the failure to comply with a discovery order must be, not only willful, but conscious and inten-

tional, rather than due to any inability. The Court of Appeals in Edgar v. Slaughter (1977 CA 8 Mo.) 548 F.2d 770 provides further requirements in order to obtain sanctions for failure to comply with a discovery order. In the Slaughter case, the Court indicated that the person seeking discovery must provide "reasonable motives" to all persons affected thereby; first, the attempt to obtain an order compelling a discovery, and second, the request to impose sanctions. First, it is clear in this action that the Defendant-Appellants did not receive actual notice, of the notice to take depositions, the Ex Parte Motion and Order Compelling Taking of Depositions, or the Ex Parte Motion and Order for

Default Judgment. The attorneys for the Plaintiff-Appellees served these notices, motions and orders at an address they knew was incorrect which casts aspersion on their motives. Secondly, pursuant to both Michigan and Federal case law it is also clear the Defendant-Appellants did not willfully disobey a discovery order. One cannot willfully disobey an order without having knowledge of the order itself. Thus, Defendant-Appellants did not consciously or intentionally disobey or evade a discovery order of the Court and the requirement of willfulness has not been met, thus making the Trial Court's entry of a Default Judgment a clear abuse of its discretion. Even if the Court did find that the

Defendant-Appellants willfully disobeyed the Court's discovery order, the great weight of authority under both Michigan and Federal case law holds that the sanction of judgment by default is the most severe sanction which the Court may apply, and therefore, its use must be tempered by careful judicial discretion to assure that its imposition is merited. Trans World Airlines, Inc. v. Hughes (CA NY 1964) 332 F. 2d 602 certiorari dismissed 380 U.S. 248, 85 S.Ct. 934, 13 L.Ed. 2d 817, 449 F. 2d 51 reversed on other grounds; In Re Anthracite Coal Antitrust Litigation, (1979 D.C. Pa. 1979) 82 F.R.D. 364; Independent Productions Corp v. Loew's, Inc. (1960 CA NY) 283 F. 2d 730; Fox v.

Studebaker-Worthington, Inc., (1975 CA 8 Minn.) 516 F. 2d 989. Moreover, the Court in Trans World Airlines, Inc. v. Hughes, 37, supra, further indicated that the totality of the circumstances surrounding failure to make discovery must be considered in determining the sanctions to apply.

It should further be known to this Court that although the Defendant-Appellants were defaulted for failure to attend a deposition pursuant to a Court Order, the Plaintiff-Appellees were provided their opportunity to take the Defendant-Appellants's deposition before the Court on August 27, 1981. The Defendant-Appellants voluntarily submitted to a creditor's examination

on that date and appeared for the purpose before Judge Horace Gilmore in the Trial Court. At that examination, no evidence was developed to contradict their garnishee disclosure statements. It was not found that they were indebted to the principal Defendant and thus have a meritorious defense to the Garnishment. This examination certainly serves to correct the defect of the Defendant-Appellants failure to appear at the court ordered depositions. In light of this fact the Trial Court's entry of a Default Judgment against the Defendant-Appellants is not only harsh but is a miscarriage of justice.

The totality circumstances involved in this case, together with

the realization that the entry of a Default Judgment is the harshest of sanctions, indicate clearly that the Trial Court abused its discretion in granting the Plaintiff-Appellees Ex Parte Motion for a Default Judgment and further that the United States Court of Appeals, Sixth Circuit erred in its decision affirming the Trial Court's action. In Dunbar v. United States (1974 CA 5 Fla.) 502 F. 2d 506 it was held that although application of Rule 37 is fully within the discretion of the Court, the Court must be mindful of the demands of the due process clause in its proceedings under such rule.

This Court has been cognizant of the due process consideration involved with the entry of Default Judgments.

In the case of Perez Y. Fernandez v. Fernandez Y. Perez, 220 U.S. 224, 31 S.Ct. 412, 55 L.Ed. 443 (1911) this Court decided that defendants not actually personally notified had the right to vacate the decree of a lower Court entered against them without their knowledge, and without their being provided with right to defend. Although this case dealt with a statute which called for the reopening of a decree by those not personally notified, this Court did, nevertheless, decide that Defendants not actually personally notified of the judgment taken against them had the right to have the judgment vacated and to defend themselves on the merits.

CONSTITUTIONAL CONSIDERATIONS

As a result of the Defendant's failure to attend depositions pursuant to the attorneys for the Plaintiff-Appellees' Ex-Parte Motion for Order Compelling Taking of Depositions and Default Judgment, the Trial Court granted the Plaintiff-Appellees Ex Parte Motion for Default Judgment. Sometime after the judgment had been entered the Plaintiff-Appellees garnished the Defendant-Appellants' personal bank account in Katy, Texas. The bank then paid Defendant-Appellants' money into the registry of the Court. There was no hearing prior to the taking of the funds in Defendant-Appellants' personel bank account. The Plaintiff-Appellees' garnishment of the Defendant-Appellants'

personal bank account without prior hearing has deprived them of their property without due process of law. In Flakes v. Coegel (1974 2d Cir.) 504 F. 2d 702, the Court held that due process Constitutional considerations underlie Fed. R. Civ. P. 37 depositions and that failure of the Court to conduct an evidentiary hearing in order to determine the question of Defendants' willfulness was an abuse of discretion.

Under both the Fifth and Fourteenth Amendments, no person may be deprived "of life, liberty or property, without due process of law." This Court has dealt with issues of procedural due process as above stated time and time again. It has certainly been established that one has the right to

be heard if the application of a rule, statute, ordinance and/or regulation would work to deprive an individual of an interest in "liberty" or "property". For more than a century this Court has found the central meaning of due process to be that parties whose rights are affected are entitled to be heard and in order to enjoy that right they must be notified. Baldwin v. Hale, 68 U.S. 223, 1 Wall. 223, 17 L.Ed. 531 (1865). In the case of Schroeder v. New York, 371 U.S. 208, 83 S.Ct. 279, 9 L.Ed. 255 (1962) the Court held when ones property interest was being affected that party had the right to be properly and adequately notified of condemnation proceedings affecting certain lands the party owned. The Court

stated on page 211 of its opinion:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objective."

In Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct 1011, 25 L.Ed. 287 (1970) the Court decided a pre-termination evidentiary hearing is necessary to provide a welfare recipient with procedural due process. The Court stated on page 267 of its opinion as follows:

> "In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally."

In Armstrong v. Manzo, 380 U.S. 545, 85

S.Ct. 1187, 14 L.Ed. 2d 62 (1965) the Court held that due process requires as its fundamental basis the opportunity to be heard and further to be heard at a meaningful time. In this case, as in the instant case, the lower court overruled the petitioners motion to vacate a judgment entered without proper notice and a hearing before its entry. On page 552 the Court stated:

> "It (meaning the hearing) is an opportunity which must be granted at a meaningful time and in a meaningful manner. The Trial Court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew... His motion should have been granted."

This Court has a consistent history of requiring adequate and proper notice as well as an evidentiary hearing prior to

the taking of funds in garnishment cases, such as the case at hand. In Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed. 349 (1969) this Court held that where the taking of one's property was involved, prior notice and a hearing must be held or the fundamental principles of due process are violated. The Court ruled the Wisconsin garnishment statute violated the due process protection afforded by the Fourteenth Amendment by not providing for proper notice and an opportunity to be heard prior to the actual garnishment. In Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed. 556 this Court held the Florida and Pennsylvania laws authorizing the summary seizure of goods in possession

of a person unconstitutional as violative of the Fourteenth Amendment. This Court indicated they failed to provide notice and a proper hearing prior to the taking of property. Finally this Court held in North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed. 2d 751 (1975) that the Georgia statues allowing the garnishment of funds without prior notice and hearing were violative of the Due Process Clause of the Fourteenth Amendment.

The foregoing cases are not distinguishable from the present case. Thus the Defendant-Appellants pursuant to their Constitutional guarantees against deprivation of property without due process of law, must be afforded

notice sufficient apprise them of the action against them and be provided an opportunity to be heard and to present their case prior to the taking of their personal property. This has not been done.

ARGUMENT ON POINT ii

The Michigan Court Rules and the Federal Rules of Civil Procedure require the observance and satisfaction of certain technical formalities before a Default Judgment may be taken. Both MGCR 1963, 520.2(2) and Fed. R. Civ. P. 55 clearly establish that it is necessary, prior to any entry of a Default Judgment against a party who has appeared, that such a party must be served with written notice of the application for judgment prior to the

hearing on such application. The only difference between the two rules is that the Michigan Rule requires the written notice of the application for judgment be served on the party against whom judgment by default is sought, at least seven (7) days prior to the hearing on the application. The Federal Rule requires written notice of the application for judgment be served on the party against whom judgment by default is sought at least three (3) days prior to the hearing on such application.

In the instant case the Defendant-Appellants had no notice whatsoever, nor were they served with the written notice of the application for judgment prior to its entry as

required pursuant to both Michigan and Federal law. It is clear from the time stamp on Plaintiffs' Ex Parte Motion for Default Judgment that the same was filed on October 12, 1977, at 5:54 p.m. The Order for Default Judgment was entered on the same date and was filed a minute later at 5:55 p.m. Furthermore, the proofs of service for these documents indicate that service of the Ex Parte Motion for Default Judgment, and the Affidavit in Support of Ex Parte Motion for Default Judgment were not even attempted until October 12, 1977. Again service was attempted by the attorneys for the Plaintiff-Appellees by mailing the same certified mail, return receipt requested to an address which they knew was no longer

the residence of the Defendant-Appellants and further which would not afford the Defendant-Appellants any notice of these proccedings. Even if the Defendant-Appellants received any of the above indicated documents it would have been well after the judgment had been entered.

Both the Michigan and Federal Courts stand firm in their convictions that the notice requirements of their respective default rules must be strictly complied with. Michigan Courts have applied this notice requirement consistently to invalidate and set aside Default Judgments and have considered the notice requirements as mandatory. In Rhodes v. Rhodes, 3 Mich. App. 396, 142 N.W. 2d 508

(1966) the Court stated the seven (7) day rule is necessary in order to prevent a judgment from being void or voidable. Lawrence v. Cook, 36 Mich. App. 156, 193 N.W. 2d 321 (1971) indicated that a Default Judgment entered three days after the date set for trial would be required to be set aside as violative of the mandatory provision of the seven (7) day notice rule. The Court further ruled that the notice requirement must be complied with regardless of the fact that the application to set aside the Default Judgment was not made within the otherwise required four (4) month period after default pursuant to M.G.C.R. 1963, 520.4. The case of Penny v. Protective National Insurance

Company of Omaha, 24 Mich. App. 218, 180 N.W. 2d 44 (1970) held an insured's default judgment against his automobile insurer and its local agent, entered without compliance with the seven (7) day notice provision of the rule was void and should be set aside. More recently, in Harrison v. VMC Building Corp., 71 Mich. App. 458, 248 N.W. 2d 584 (1976), default judgment was vacated where the Defendant was not served with written notice of application of judgment at least seven (7) days prior to the hearing on the application. In Vaillencourt v. Vaillencourt, 93 Mich. App. 344, 287 N.W. 2d 230 (1979), it was held that the failure of the party seeking the default judgment to give written notice

of the intention to do so to a party who has appeared in the action invalidates the judgment and requires that it be vacated. Similarly, it was held in Petroff v. Petroff, 88 Mich. App. 18, 276 N.W. 2d 503 (1979), that the seven (7) day notice provision for entry of judgment by default is mandatory and failure to give the required notice invalidates the judgment and requires that it be vacated.

Federal authority lends further support to the Defendant-Appellants' position. The case of Meeker v. Rigley (1963 C.A. Olka.) 324 F. 2d 269, held failure to give Plaintiff the notice provided in subdivision (b)(2) of Federal Rule of Civil Procedure 55

prior to entry of default judgment constituted grounds for setting aside default. A Michigan Federal Court decision held that Defendants were entitled to written notice three days prior to entry of default judgment and, in the absence of such notice, were entitled to an order setting the default judgment. Lutomski v. Panther Valley Coin Exchange, (1981 C.A. Mich) 653 F. 2d 270. The great weight of Federal case law has held that the failure to provide notice of application for default judgment at least three (3) days prior to the hearing on the application is a serious procedural irregularity which usually justifies setting aside a default judgment or

reversing the failure to do so. Wilson v. Moore & Associates, Inc. (1977 C.A. Hawaii) 564 F. 2d 366, Savorette v. Rodriguez-Jiminez (1958 C.A. Fla.) 252 F. 2d 29, Press v. Forest Laboratories, Inc., (1968 D.C. NY) 45 F.R.D. 354. The Federal Courts have also indicated that the failure to abide by the notice requirements of Rule 55 (b)(2) of the Federal Rules of Civil Procedure would result in a failure of due process. Ken-Mar Airpack, Inc. v. Toth Aircraft & Accessories Co., (1952 D.C. Mo.) 12 F.R.D. 399, Sonus Corp. v. Matsushita Elec. Industrial Co., Ltd., (1974 D.C. Mass.) 61 F.R.D. 644.

In the instant case the failure to provide the Defendant-Appellants with the requisite notice and further

the failure to provide them with the requisite hearing has resulted in a deprivation of the funds in their personal bank account. Such a deprivation of property without prior notice and hearing surrenders the very essence of the due process clauses of both the Fifth and Fourteenth Amendments of the United States Constitution.

The Defendant-Appellants incorporate hereat the Constitutional considerations contained in pages 42 through 49 of this Petition by reference as if set forth verbatim for this Honorable Court's review.

ARGUMENT ON POINT iii

There exists a third reason as to why the Trial Court abused its

discretion in not granting the Defendant-Appellants' Motion to Set Aside Default Judgment and as to why the United States Court of Appeals, Sixth Circuit erred in its affirmation of that decision. The Trial Court had no jurisdiction over the Defendant-Appellants who lived in Texas or over the funds garnished, which were deposited in a Texas bank.

Garnishment proceedings in Federal Court are governed by the law of the State wherein the Federal Court is located. Thus, the Trial Court in the present case was governed by Michigan law. The Michigan garnishment statute, MCL 600.4011; MSA 27A.4011 indicates that the Michigan Circuit Court has the power to garnish the per-

sonal property of another within the boundaries of the State or has the power to garnish an obligation owed to another if the obligor is subject to the jurisdiction of the state.

The Plaintiff-Appellees obtained a Writ of Garnishment directed to Katy National Bank, the Garnishee Defendant, and had the same served in the State of Texas. There is nothing in the record to indicate that the garnishment at the time of issuance was asserted against any personal property within the boundaries of the State of Michigan or against an obligor (Katy National Bank of Katy, Texas) who is subject to the judicial jurisdiction of the State of Michigan. In Michigan, garnishment proceedings are governed by

statute and Court rules, and because it is often a harsh remedy, the statutory requirements are strictly construed. Peoples Wayne County Bank v. Scott, 246 Mich. 514; 224 N.W. 352 (1929); Insurance Co. of North America v. Issett, 84 Mich. App. 45 (1978). Since none of the circumstances as set forth in the statute authorizing garnishment exists in this case, it is clear that the Writ of Garnishment directed to the Katy Naitonal Bank, Katy, Texas, was improvidently issued and improperly served beyond the boundaries of the State of Michigan. Nor does the fact that the Katy National Bank filed an appearance and forwarded to the Court funds for deposit operate as a waiver of the defect in the

issuance and service of the garnishment. Insurance Co. of North America v. Issett, 61, supra.

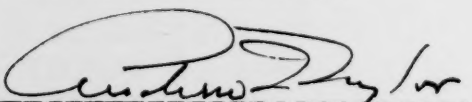
Defendant-Appellants' assert the taking of their personal bank account over which the Trial Court had no jurisdiction when considered together with the facts that (1) the Defendant-Appellants had no prior notice of the garnishment and (2) no hearing was conducted prior to said garnishment concerning the taking of the funds violates their due process guarantee. The Defendant-Appellants incorporate hereat by reference the Constitutional Considerations contained in pages 42 through 49 as if set forth verbatim for this Honorable Court's review.

CONCLUSION

Full review of this case will give needed clarification on the issues set out above. For these reasons Petitioner asks that a Writ of Certiorari issue to review the decision of the United States Court of Appeals, Sixth Circuit.

Respectfully submitted,

LAW OFFICES OF
LARSON AND TAYLOR



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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPTENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al.

Plaintiffs,

-v- No. 74-70498

PATRICK COUSSENS and MARY COUSSENS,

Principal Defendants.

KATY NATIONAL BANK,

Garnishee Defendant

BEFORE THE HONORABLE HORACE W. GILMORE

Detroit, Michigan - Friday,

September 4, 1981

APPEARANCES:

Mr. Joel Shere

Appearing on behalf of

Plaintiffs

Mr. Michael Marston

Appearing on behalf of

Principal Defendants

REPORTED BY:

Elizabth A. Higdon

Offical Court Reporter

Detroit, Michigan

Friday, September 4, 1981

* * * * *

OPINION OF THE COURT

THE COURT: All right, gentlemen.

The issue in this case is whether the $15,000 that is in the possession of the Clerk should be ordered turned over to the Plaintiff pursuant to the disclosure of the Garnishee Defendant, Katy National

Bank.

The facts are that judgment was obtained against the Traig Roofing Company, of which the Coussens were officers back in 1976 or 1977. A garnishment was filed on the Coussens, and a disclosure on Mr. August's stationery or letterhead returned showing no indebtedness. The Plaintiffs thereupon noticed the deposition of the Coussens and mailed it to Mr. August, who had filed the garnishee disclosure. Mr. August immediately wrote back, or called back, I forget which, but immediately notified the Plaintiff that he was not representing the Coussens in this matter and could not accept the service for them. Thereupon the Plaintiffs, by first class mail, mailed

a letter on June 2, 1977 to the August residence, giving notice of the deposition.

MR. SHERE: Your Honor said the August residence. It would have to be the Coussens' residence.

THE COURT: Coussens' residence, giving notice of deposition.

It is undisputed in the record that the Coussens remained at that address to which that was mailed until June 17, 1977, and it is undisputed in the record that that notice was never returned. It is true there is an affidavit by the Coussens saying they never received it, but the fact remains that the letter never was returned and the Coussens did live in that house.

They did not respond to the notice of deposition, and subsequently, in September of 1977, an order was obtained from Judge Kenndey directing that they appear for deposition on October 11, 1977. The order also said that there would be a default judgment entered if they should fail to appear and be deposed. That order was sent by mail to the address in Utica, Michigan and returned, "moved, left no address."

Now all of this was before Judge Kennedy when she entered a default judgment on October 12th, 1977. Judge Kennedy said in her order,

> "It appearing to the Court that proper service of this Court's order of September 27, 1977 by

certified mail was attempted by the Plaintiffs as provided in the aforesaid order, that Patrick Coussens, Mary Coussens and Traig Roofing and Sheet Metal failed to appear and be deposed on October 11, 1977 as directed; that Plaintiffs have exhausted all reasonable means of proceeding against Patrick Coussens, Mary Coussens and Traig Roofing."

It also was held by Judge Kennedy earlier that the Plaintiffs had complied with all procedure requirements for the taking of the deposition of the Garnishee-Defendant. She applied GCR 313.4 and eventually

entered the default judgment on October 12, 1977.

Well, I don't think there is anything in this record that will compel me to set aside Judge Kennedy's judgment. I think it was properly entered. I think there is no question that the Coussens received, and I find as a fact based upon what I have before me, that the Coussens did receive notice in June 1977. I think the Coussens wilfully avoided attending that first deposition. I think there is no basis for this Court, four years later, to say that Judge Kenndey erred in granting the default judgment. She made her findings, she had the entire matter before her, and I think the entry of that default judgment was

perfectly justified. So I think we have a valid default judgment in the amount of 70 some thousand dollars.

Now with reference to the $15,688.15 paid into the Court by Garnishee-Defendant Katy National Bank, it is the contention of the Defendant that if I find the default judgment was valid, that I still should not order the turning over of the money because Defendant says that the Court has no jurisdiction over the Katy National Bank and that this Court's writs cannot run to the Katy National Bank, which is located in Texas, outside the jurisdiction of the Eastern District of Michigan. That may very well be true, and I am not going to argue or say that

it isn't, but I think it is academic. I think it is not relevant. The reason I think it is not relevant is that although the Katy National Bank might very well have resisted the writ of garnishment from this Court and might very well have resisted the sending of money in, they did not do so. The money is now here. They have subjected themselves to the jurisdiction of the Court by sending the money in.

Therefore, I will grant the Plaintiff's Motion and direct payment of the money pursuant to the disclosure in the clerk's office.

MR. SHERE: Your Honor, I have an order prepared, and there in one further matter in the case. There is still pending before this Court, which

I think has been resolved by the Court's decision today, the motion and proposed order of the Katy National Bank for the Court to actually receive the deposit of the funds and to discharge.

THE COURT: Well, I have ordered the money to be turned ober, so whatever papers have to be signed, I will. I have held as a matter of law that they have submitted themselves to the jursidiction of the Court for this particular case.

MR. SHERE: We have an order, your Honor.

THE COURT: Any objection to the order, Mr. Marston?

MR. MARSTON: I have no objec-

tion if that's what is your Honor's order.

THE COURT: Thank you all.

CERTIFICATE

I, Elizabeth A. Higdon, do hereby certify that I reported stenographically the proceedings has in the above-entitled cause before the Honorable Horace W. Gilmore, United States District Judge, at the time and place hereinbefore set forth; that the same was thereafter reduced to typewritten form under my supervision; and I do further certify that the foregoing transcript is a full, true and correct transcript of my stenographic notes.

/s/ Elizabeth A. Higdon

ELIZABETH A. HIGDON

Offical Court Reporter

DATED: Detroit, Michigan

March 8, 1982

FILED
May 26, 1983
John P. Hehman, Clerk

No. 81-1645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, A VOLUNTARY UNINCORPORATED LABOR UNION, ET AL.,

Plaintiffs-Appellees,

v. ORDER

PATRICK COUSSENS and MARY COUSSENS,

Defendants-Appellants,

and

KATY NATIONAL BANK,

Defendant

_____/

BEFORE: JONES and WELLFORD, Circuit

Judges, and TIMBERS, Senior Circuit Judge *

Defendants-appellants, Patrick and Mary Coussens, appeal from an order of the district court denying their motion to set aside a default judgment entered against them. We find that the district court did not abuse its discretion when it entered the default judgment in question. We affirm.

In May 1976 two judgments were entered against Traig Roofing, Inc., a Michigan corporation solely owned by Patrick and Mary Coussens. The first, in favor of the Carpenters Union, was

* The Honorable William H. Timbers, United States Court of Appeals for the Second Circuit, Sitting by designation

for $44,820.25 representing Traig's indebtedness for wages owed for the period from 1971 through 1973. The second, in favor of the Detroit Carpenters Fringe Benefit Fund, was for $25,725.30, representing fringe benefit contributions owed for that same period.

On May 19, 1977, writs of garnishment were issued against Partick Coussens, Mary Coussens and Traig Roofing and Sheet Metal, Inc., a second corporation which the Coussenses owned. The purpose of these writs was to inquire into the Coussenses' relationship with Traig. Garnishee disclosures were filed on behalf of the three defendants by attorney Irving A.

August. These disclosures denied any indebtedness to Traig.

The plaintiffs challenged these disclosures. Depositions were scheduled for July 1, 1977 and a notice thereof was served by regular mail upon Patrick Coussens, Mary Coussens and attorney Irving August. On June 1, 1977, August sent plaintiffs' attorneys a letter stating that although the disclosures had been upon his stationery, he had not made an appearance on behalf of the Coussenses and that the Coussenses had informed him that they were going to proceed to represent themselves.

On June 2, 1977, the notice of

deposition was sent to Patrick and Mary Coussens by mailing a copy to their home address in Utica, Michigan. Though the Coussenses claim that they never received the notice of deposition, the envelope containing the notice was not returned to the plaintiffs' counsel. It is undisputed that the Coussenses did not move from their Michigan home until June 17, 1977. On June 23, 1977, plaintiffs' counsel telephoned Irving August, who again indicated that he did not represent any of the garnishee defendants. August also advised plaintiffs' counsel that he believed that Traig Roofing and Sheet Metal, Inc. was insolvent and had

terminated business in the State of Michigan and that the Coussenses had permanently left the State of Michigan and were residing in Texas. None of the garnishee defendants attended the July 1 deposition.

On or about July 13, 1977, plaintiffs' counsel filed an ex parte motion for an order compelling the taking of depositions and for a default judgment. On September 26, 1977, Judge Kennedy issued an opinion and order granting the motion to compel the taking of depositions. The order did not then grant a default judgment but did indicate that should the garnishee defendants fail to comply with the

order compelling discovery, such a default judgment would be entered.

In accordance with the terms of Judge Kennedy's order, copies of the order were mailed, certified mail, return receipt requested, to the Coussenses at their last known address in Utica, Michigan. A copy of the order was also sent by first-class mail to Irving August. On October 3, 1977, the envelopes containing the copies of the order mailed to the Coussenses were returned to the plaintiffs' attorney stamped "moved, left no address."

The Coussenses did not appear for their court-ordered deposition on October 11, 1977 and on October 12,

1977 the plaintiffs filed an ex parte motion for default judgment. Judge Kennedy entered an order for such judgment on the same day.

In May 1981, the plaintiffs located funds of the Coussenses on deposit with the Katy National Bank in Katy, Texas. On May 26, 1981, a writ of garnishment was issued by the clerk of the district court in Michigan directed to the bank. The bank filed a disclosure stating that it was indebted to the Coussenses in the amount of $15,688.15. It is undisputed that the bank notified the Coussenses that it had been served with the writ.

On or about July 23, 1981, the

bank filed a motion for payment of monies pursuant to disclosure and requested an issuance of a receipt in discharge of liability. Along with the motion and proposed order and receipt, a $15,688.15 cashier's check was tendered to the clerk. Copies of these documents were mailed to the Coussenses' present attorney, Thomas A. Adams, III.

At about the same time that the bank filed its motion and tendered its check, the plaintiffs filed a motion requesting the court to direct the clerk to turn the money over to them. The Coussenses, through attorney Adams, in addition to opposing both the bank's

and the plaintiffs' motions, filed a motion to set aside the default judgment entered against them.

All these motions were heard and considered by Judge Gilmore on August 27 and September 4, 1981. Following this hearing, Judge Gilmore denied the Coussenses' motions to set aside the default judgment and ordered that the money be turned over to the plaintiffs. Judge Gilmore made several significant findings of fact in the course of his order entering these judgments.

> 1. That the Coussenses did receive the notice of deposition sent in early June 1977.
>
> 2. That the Coussenses had willfully avoided attending that first deposition.

3. That the Katy National Bank had by consent subjected itself to the jurisdiction of the Michigan district court.

The appellants claim that the district court erred in refusing to set aside the default judgment entered against them and granting the appellees' motion for release and payment of the garnishment funds.

The district court has broad discretion in its handling of pretrial discovery matters. City of Cleveland v. Krupansky, 619 F.2d 572, cert. denied, 101 S.Ct. 106 (6th Cir. 1980). As such, an order dismissing a claim under the provisions of Rule 37, Federal Rules of Civil Procedure, is

within the discretion of the trial court and may be reversed only upon a clear showing of an abuse of that discretion. See National Hockey Leauge v. Metropolitan Hockey Club, 427 U.S. 639 (1976).

The appellants in this case totally failed to appear for the July 1, 1977 deposition. Rule 37(d), Federal Rules of Civil Procedure (FRCP), provides for the imposition of sanctions upon failure to participate in legitimate discovery proceedings. The district court did not impose sanctions for the mere failure to appear at the deposition, however. Instead, the trial judge entered an order compelling

appearance at a deposition and did not sanction the appellants until after that order was itself violated. Accordingly, the analysis necessary here is that applicable under Rule 37(b), dealing with discovery orders and the sanctions premissible for failure to comply with them.

Rule 37(b) sets our the permissible sanctions for a failure to comply with all discovery orders. It permits the court to make such orders with regard to the failure "as are just." In enumerating possible sanctions, the rule permits, inter alia:

> (iii) [a]n order striking out pleadings or parts hereof, or staying further proceedings until the order is obeyed, or

> dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party ... (emphasis added).

The rule clearly authorized the imposition of some sanction for any failure to comply, even innocent ones. The Advisory Committee Notes to the 1970 amendments and the applicable case law, however, require further considerations of culpability before certain sanctions can be imposed. See Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958). Accroding to Societe Internationale, if the failure to comply is because of inability to comply, rather than because of willfulness, bad faith, or any fault of

the party, the action may not be dismissed, nor a default judgment given, and less severe sanctions are the most that can be invoked. See also, Wright & Miller, Federal Practice and Procedure §2284 at 766.

The appellants claim that, for several reasons, the entry of a default judgment against them was improper. First, the appellants claim that they were not actually parties to the suit and, hence, that it would be unfair to enter a default judgment against them. They claim that where those objecting to default judgments have no more than a tenuous connection to the proceedings, it would be unfair to expect

those persons to be fully cognizant of the possibility of a default judgment and that justice therefore requires that such default judgment be set aside. Secondly, the appellants claim that the default judgment must be set aside because its original entry was improper. This claim is based upon their argument that the order compelling deposition was itself improper since they had no notice of the original deposition and were therefore not in violation of any of the provisions of Rule 37 when they failed to appear at that deposition. Third, the appellants claim that the default judgment was entered in violation of

FCRP 55(b)(2) and its Michigan counterparts, GCR 1963 520.2(2). Both rules require that the party against whom a default judgment is sought is to be served with written notice of the application for such judgment prior to a hearing on the application, or an entry of the judgment. Under the federal rules, that notice must be served at least three days prior to the hearing, and under the Michigan rule notice must occur at lease seven days prior to that time.

We believe the appellants' first argument in this context is without merit. GRC 1963, 738, makes clear that the Coussenses were made parties to

this litigation no later than the time that they were served with the writ of garnishment. Rule 738.1 states that "the affidavit for the garnishment writ shall be considered a complaint by the plaintiff against the garnishee as defendant." If there is a trial of any issue agaisnt [sic] the garnishee defendant, the same subrule provides that "if interrogatories are served or oral examination demanded, the disclosure, the answers to the interrogatories, and the transcript of the examination shall be considered an answer to the affidavit." Finally, after the necessary proceedings have been concluded, Rule 738.13 states that

"judgment may be entered against the garnishee for the payment of money... as may be warranted by the facts." It is obvious that the appellants' claim that, because they were only garnishee defendants, they could not be parties to the litigation is unsupportable in light of the Michigan statutory rules governing the effects of an issuance of a writ of garnishment.

The district court found, as a matter of fact, that the Coussenses and received notice of the deposition proceedings and that they had willfully failed to attend those proceedings. The appellants contend that the district court erred in making this

determiantion, arguing that they had received no notice of the deposition and, hence, a finding that they had willfully failed to appear at the deposition is unsupportable. As noted above, a willfullness determination is necessary before a default judgment can be employed as a sanction under Rule 37(b). Our reading of the reocrd indicates that the district court's determinations were not clearly erroneous. While it is true that the appellants had left the State of Michigan before the date of the deposition, it appears that they left their Utica address significantly after the notice of deposition was sent to that address by

regular mail. In addition, in an affidavit dated September 1, 1981, attorney Irving August cast some light upon the Coussenses' decision to represent themselves in the garnishment proceeding. In that affidavit, August stated, inter alia:

> I advised Partick Coussens that if I filed an appearance in the above-referenced case, the effect of that would be that service upon myself of any pleadings, motions, or orders would constitute notice to themselves and be binding upon them. He indicated that they did not desire this consequence and therefore instructed me not to file an appearance in this case.

The evidence clearly indicates that the Coussenses' efforts to avoid discovery proceedings were willful and calculated. Again, on the undisputed facts,

we find that Judge Gilmore's determination on this issue, and Judge Kennedy's earlier finding to the same effect, were not clearly erroneous.

The appellants' technical argument regarding the filing of the default judgment only minutes after the ex parte motion for such judgment was filed also does not support their motion to set aside the default judgment. We believe that the notice contemplated in the rules was fully complied with. Judge Kennedy's September 17, 1977 order compelling the taking of the depositions sepcifically stated that if the Coussenses did not appear on October 11, 1977, judgments

by default would be entered against them. Service of that order was effectuated on September 27 in manner consistent with that dictated by the terms of the order itself. The order for default judgment against Patrick Coussens, Mary Coussens and Traig Roofing and Sheet Metal, Inc., was not entered until October 12, 1977. The ex parte motion for default judgment was before the district court and referenced in the order of September 27 which anticipated the eventual entry of the default judgment. We find that the notice received by the Coussenses was fully sufficient to justify the entry of the judgment against them.

Accordingly, we find that the district court did not abuse its discretion in entering the default judgment against the Coussenses pursuant to Rule 37(b), FRCP.

Under §4011(1) of Michigan's Revised Judicature Act, in post-judgment ancillary proceedings, the court has the power of garnishment to:

> apply the following property or obligation, or both, to the satisfaction of a claim evidenced by contract, judgment of the state, or foreign judgment, whether or not the state has jurisdiction over the person against whom the claim is asserted: ...
>
> (b) an obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction fo [sic] the state.

The appellants argue that the terms of the statute must be satisfied before the writ of garnishment could justifiably be issued. Their contention is that because the Katy National Bank, the obligor in this case, was not subject to the jurisdiction of the Michigan courts prior to the institution of the garnishment proceeding, the requirements of the garnishment statute cannot be satisfied. In support of this contention, the appellants cite Insurance Co. of North America v. Issett, 84 Mich. App. 45 (1978). In Issett, the state court of appeals considered a case in which the affidavit of garnishment, a document which the

statute requires be filed when any garnishment proceeding is instituted, had not been delivered to the court. Despite the failure to file the affidavit, the garnishee defendant had filed pleadings and otherwise generally submitted to the personal jurisdiction of the court. The state court of appeals dismissed the action, finding that a waiver of personal jurisdiction cannot operate to confer subject matter jurisdiction on the court when the requirements mandated by the statute have not been fulfilled. The appellants argue that this case stands for the proposition that all requirements of the garnishment statute must be satisfied

before subject matter jurisdiction can exist and that it is therefore irrelevant to a jurisdictional determination that Katy National Bank had otherwise submitted to the personal jurisdiction of the court.

Though this position at first appears to have some substance to it given Issett, a closer look at that case and the garnishment statute reveals the error in the argument. Issett was concerned with the failure to comply with the technical aspects of an appropriate garnishment filing for purposes of determining whether subject matter jurisdiction had been conferred upon the court. The present case,

however, concerns the jurisdictional provision of the garnishment statute and the issue of whether personal jurisdiction exists over the obligor.

The practice commentary acccm-panying Michigan Revised Judicature Act §600.4011 indicates, in pertinent part, the following:

> The acquisition of personal jurisdiction over the garnishee requires (1) a prescribed jural relationship or contact with the state and (2) direct or substituted personal service of the writ on the garnishee in the manner prescribed ...
>
> The jural realtions or contacts which afford a basis for personal jurisdiction are prescirbed by RJA Chapter 7. A natural person may be subjected to personal jurisdiction as a garnishee on the basis of (1) service within the state, even

> through a nonresident, (2) domicile within the state at the time he is served, or (3) consent, to the extent authorized ... Personal jurisdiction over a corporate garnishee may be acquired on the basis of (1) incorporation within the state, (2) consent, to the extent authorized, or (3) continuous and systematic business within the state. (Citations omitted.) Since these contacts give the court general personal jurisdiction, the garnishee's liability may include any indebtedness to the principal defendant, even if it ariss from out-of-state transactions.

In light of this interpretation of the statute, Judge Gilmore's resolution of this issue is wholly appropriate. When considering the appellants' argument in this context, Judge Gilmore noted that the question of whether or not jurisdiction could

involuntarily be exercised over the obligor, Katy National Bank, prior to the issuance of the writ of garnishment was irrelevant. In the memeorandum opinion accompanying his order, the trial judge noted the following:

> The reason I think it is not relevant is that although Katy National Bank might very well have resisted the writ of garnishment from this court and might very well have resisted the sending of money in, they did not do so. The money is now here. They have subjected themselves to the jurisdiction of the court by sending the money in.

Though only discussing Katy National Bank's submission to personal jurisdiction in general terms, and not noting its effect in light of the specific terms of the garnishment statute, the

district court's conclusion is clearly correct. All the garnishment statute requires is jurisdiction over the obligor; once Katy National Bank filed disclosures and payment of monies, such jurisdiction existed as to it. The issue of one of personal, not subject matter jurisdiction as in Issett, making a waiver analysis appropriate. Accordingly, we find that the appellants' argument on this point is also without merit.

The order of the district court is hereby AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN /EG

Clerk

FILED
January 18, 1984
John P. Hehman, Clerk

No. 81-1645

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, A VOLUNTARY UNINCORPORATED LABOR UNION, ET AL,

Plaintiffs-Appellees,

v. ORDER

PATRICK COUSSENS and MARY COUSSENS,

Defendants-Appellants,

and

KATY NATIONAL BANK,

Defendant

_____/

BEFORE: JONES and WELLFORD, Circuit

Judges, and TIMBERS, Senior Circuit Judge*

Defendants-appellants, Patrick and Mary Coussens, petition this Court for a rehearing of their appeal from an order of the district court denying their motion to set aside a default judgment against them. By Order filed May 26, 1983, we affirmed the judgment entered against the appellabts.

Upon consideration of the issues presented by the original appeal and the present petition, we find unwarranted any rehearing of this case. In their petition for rehearing,

---

* The Honorable William H. Timbers, United States Court of Appeals for the Second Circuit, sitting by designation.

appellants contend that this Court's order contains several factual inaccuracies. Our review of appellant's contentions however reveals that those alleged inaccuracies are disagreements of fact between appellants and the district court. We could not initially, nor can we now, find the district court's factual findings "clearly erroneous."

Further, we find no merit in the appellants' legal arguments. Confronted with the Coussens' willful refusal to appear at their first deposition and Katy National Banks' consent to jurisdiction, the district judge acted well within his wide discretion in entering against appellants a

default judgment. City of Cleveland v. Krupansky, 619 F.2d 572 (6th Cir.), cert. denied, 101 S. Ct. 106 (1980).

Accordingly, the appellants petition for rehearing is hereby DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al,

Plaintiffs,

-v- No. 74-70498

TRAIG ROOFING, INC., a Michigan corporation,

Principal Defendant,

-and-

PATRICK COUSSENS, MARY COUSSENS and TRAIG ROOFING & SHEET METAL, INC., a Michigan corporation

Garnishee Defendants.

_____/

ORDER FOR DEFAULT JUDGMENT

At a session of said Court held in the Federal Building, Detroit, Michigan on October 12, 1977

PRESENT: Hon. Cornelia G. Kennedy

United States District Judge

Plaintiffs' Ex-Parte Motion for Default Judgment and supporting Affidavit of Coleman E. Klein having been considered, it appearing to the Court that proper service of this Court's Order of September 27, 1977 by certified mail was attempted by plaintiffs as provided in the aforesaid Order, that Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc. failed to appear and be deposed On October 11, 1977 as directed in the aforesaid Order, that plaintiffs have exhausted all reasonable means of proceeding against said Patrick Coussens, Mary

Coussens and Traig Roofing & Sheet Metal, Inc.,

IT IS HEREBY ORDERED that default judgment be, and it is hereby, entered in favor of plaintiffs Carpenters District Council of Detroit, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and against Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc., garnishee defendants herein, jointly and severally, in the principal amount of $44,820.25 plus accrued interest thereon from May 19, 1976 through October 12, 1977 at the rate of six percent per annum in the amount of $3,772.27 plus accrued

costs of $25.08, resulting in a total judgment of $48,617.60, with interest thereupon to accrue at the rate of six percent per annum from October 12, 1977;

IT IS FURTHER ORDERED that judgment be, and it is hereby, entered in favor of plaintiff Detroit Carpenters Fringe Benefit Funds and against Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc., garnishee defendants herein, jointly and severally, in the principal amount of $25,725.30 plus accrued interest thereon from May 19, 1976 through October 12, 1977 at the rate of six percent per annum in the amount of

$2,165.15 plus accrued costs of $144.18, resulting in a total judgment of $28,034.63, with interest thereupon to accrue at the rate of six percent per annum from October 12, 1977.

/s/ Cornelia G. Kennedy
United States District Judge

A TRUE COPY
HENRY R. HANSSEN, Clerk
By /s/ Judy Casoody
Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al,

Plaintiffs,

-v- No. 74-70498

TRAIG ROOFING, INC., a Michigan corporation,

Principal Defendant,

-and-

PATRICK COUSSENS, MARY COUSSENS and TRAIG ROOFING & SHEET METAL, INC., a Michigan corporation

Garnishee Defendants.

_____/

PROOF OF SERVICE

Received
October 12, 1977
Cornelia G. Kennedy
United States District Judge

STATE OF MICHIGAN)

) ss.

COUNTY OF OAKLAND)

COLEMAN E. KLEIN, being first duly sworn, deposes and says that on the 12th day of October, 1977 he served a true copy of Order For Default Judgment upon Patrick Coussens, Mary Coussens and Triag Roofing & Sheet Metal, Inc., garnishee defendants, by enclosing same in envelopes correctly and plainly addressed to Patrick Coussens, 8300 Pacton, Utica, Michigan 48087, Mary Coussens, 8300 Pacton, Utica, Michigan 48087 and Traig Roofing & Sheet Metal, Inc., 8300 Pacton, Utica, Michigan 48087 and depositing said envelopes in the United States

mail, certified mail return receipt requested, with postage thereon fully prepaid, and upon Irving A. August, Esq., 555 South Woodward, Seventh Floor, Birmingham, Michigan 48011 by regular United States mail with postage thereon fully prepaid.

/s/ Coleman E. Klein

COLEMAN E. KLEIN

Subscribed and sworn
to before me this 12th
day of October, 1977.

/s/ Karen F. Rivett

Karen F. Rivett
Notary Public, Oakland
County, Mich.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al,

Plaintiffs,

-v- No. 74-70498

TRAIG ROOFING, INC., a Michigan corporation,

Principal Defendant,

-and-

PATRICK COUSSENS, MARY COUSSENS and TRAIG ROOFING & SHEET METAL, INC., a Michigan corporation

Garnishee Defendants.

_____/

EX-PARTE MOTION FOR DEFAULT JUDGMENT

RECEIVED
October 12, 1977
Corenlia G. Kennedy
United States District Judge

NOW COME all of the plaintiffs herein, by and through their attorneys, Shere & Klein, P.C., and hereby move this Honorable Court for the entry of an order entering default judgment against Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc., garnishee defendants herein, for the reason that none of the aforesaid garnishee defendants appeared for depositions on Tuesday, October 11, 1977 at 9:30 A.M. as ordered by this Honorable Court on September 27, 1977.

This motion is based upon the record and file in this cause and upon the supporting affidavit attached hereto and made a part hereof.

Respectfully submitted,

SHERE & KLEIN, P.C.

By: /s/ Coleman E. Klein

Dated:
October
11, 1977

Coleman E. Klein (P 16035)
Attorneys for Plaintiffs
3000 Town Center, Suite
2633
Southfield, Michigan 48075
353-5432

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al,

Plaintiffs,

-v- No. 74-70498

TRAIG ROOFING, INC., a Michigan corporation,

Principal Defendant,

-and-

PATRICK COUSSENS, MARY COUSSENS and TRAIG ROOFING & SHEET METAL, INC., a Michigan corporation

Garnishee Defendants.

_____/

AFFIDAVIT IN SUPPORT OF

EX-PARTE MOTION FOR DEFAULT JUDGMENT

RECEIVED
October 12, 1977
Cornelia G. Kennedy
United States District
Judge
A-59

STATE OF MICHIGAN)

) ss.

COUNTY OF OAKLAND)

COLEMAN E. KLEIN, being first duly sworn, deposes and says:

1. That he is one of the attorneys for the plaintiffs herein and makes this affidvait in support of plaintiffs' Motion For Default Judgment.

2. That on September 27, 1977 an order compelling taking of depositions was entered by this Honorable Court requiring Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc., garnishee defedants, to appear at the offices of Shere & klein, P.C., attorneys for plaintiffs herein,

3000 Town Center, Suite 2633, Southfield, Michigan 48075 on Tuesday, October 11, 1977 at 9:30 A.M. to be deposed by the plaintiffs in this cause.

3. That the aforesaid order of September 27, 1977 further provided that default judgment be entered against those garnishee defendants aforesaid who shall fail to appear and be so deposed as so ordered and that a copy of the aforesaid order be served upon all of the aforesaid garnishee defendants by certified mail addressed to their respective last known addresses.

4. That on September 27, 1977 true copies of the order of September

27, 1977 and this Honorable Court's opinion dated September 26, 1977 were served upon all of the aforesaid garnishee defendants by certified mail addressed to theri last known address, 8300 Pacton, Utica, Michigan 48087, that he knows of no other or more recent address, and a copy was also sent (albeit not required by the order) by regular mail to the former attorney for said garnishee defendants, Irving A. August, Esq., as more fully appears in the Proof of Service dated September 27, 1977 and previously filed in this cause; and that all of the certified mailings were returned to the deponent by the United States Post Office on October 3, 1977 marked by the Post

Office "Returned to Sender; Moved, left no address".

5. That all of the aforesaid garnishee defendants failed to appear on October 11, 1977 as provided in the aforesaid order and did not notify deponent, plaintiffs or plaintiffs' attorney that they would not attend.

6. That the interests of justice would be best served by this Honorable court's entry of an order for default judgment against Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc., garnishee defendants, jointly and severally.

/s/ Coleman E. Klein

COLEMAN E. KLEIN

Subscribed and
sworn to before
me this 11th day
of October, 1977.

/s/ Karen F. Rivett

Notary Public, Oakland
County, Mich.
My Commission Expires
11-16-77

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al,

Plaintiffs,

-v- No. 74-70498

TRAIG ROOFING, INC., a Michigan corporation,

Principal Defendant,

-and-

PATRICK COUSSENS, MARY COUSSENS and TRAIG ROOFING & SHEET METAL, INC., a Michigan corporation

Garnishee Defendants.

_____ _____/

BRIEF IN SUPPORT OF

EX-PARTE MOTION FOR DEFAULT JUDGMENT

RECEIVED
October 12, 1977
Cornelia G. Kennedy
United States District Judge

The relief requested by plaintiffs herein is provided in this Honorable Court's Order Compelling Taking of Depositions entered September 27, 1977, this Honorable Court's Opinion and Order granting motion to compel taking of depositions entered September 26, 1977 and upon the record and file in this cause. Plaintiffs incorporate by reference their brief in support of ex-parte motion for order compelling taking of depositions and default judgment filed on July 12, 1977 and their supplemental brief filed July 21, 1977.

Respectfully submitted,

SHERE & KLEIN, P.C.

By: /s/ Coleman E. Klein

Dated: October 11, 1977

COLEMAN E. KLEIN (P 16035)
Attorneys for Plaintiffs
3000 Town Center, Suite 2633
Southfield, Michigan 48075
353-5432

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARPENTERS DISTRICT COUNCIL OF DETROIT, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, a voluntary unincorporated labor union, et al,

Plaintiffs,

-v- No. 74-70498

TRAIG ROOFING, INC., a Michigan corporation,

Principal Defendant,

-and-

PATRICK COUSSENS, MARY COUSSENS and TRAIG ROOFING & SHEET METAL, INC., a Michigan corporation

Garnishee Defendants.

_____/

PROOF OF SERVICE

STATE OF MICHIGAN)

) ss.

COUNTY OF OAKLAND)

COLEMAN E. KLEIN, being first duly sworn, deposes and says that on the 12th day of October, 1977 he served a true copy of Ex-Parte Motion for Default Judgment, Affidavit In Support Of Ex-Parte Motion For Default Judgment and Brief In Support Of Ex-Parte Motion For Default Judgment on Patrick Coussens, Mary Coussens and Traig Roofing & Sheet Metal, Inc., garnishee defendants, be enclosing same in envelopes correctly and plainly addressed to Patrick Coussens, 8300 Pacton, Utica, Michigan 48087, Mary Coussens, 8300 Pacton, Utica, Michigan 48087 and

Traig Roofing & Sheet Metal, Inc., 8300 Pacton, Utica, Michigan 48087 and depositing said envelopes in the United States mail, certified mail return receipt requested, with postage thereon fully prepaid, and upon Irving A. August, Esq., 555 South Woodard, Seventh Floor, Birmingham, Michigan 48011 by regular United States mail with postage thereon fully prepaid.

/s/ Coleman E. Klein

COLEMAN E. KLEIN

Subscribed
and sworn to
before me this
12th day of
October, 1977

/s/ Karen F. Rivett

Karen F. Rivett

Notary Public, Oakland County,

Mich.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CONSTITUTION

AMENDMENT XIV

(Ratified July 9, 1868)

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age,* and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation

* Changed by section I of the twenty-sixth amendment.

therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or

given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

GCR 520 MICHIGAN GENERAL COURT RULES

Rule 520. DEFAULT.

.1 Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affdiavit or otherwise, the person seeking the relief or his attorney shall enter the default of that party by filing with the clerk a statement called a default, signed by the person seeking the relief or his attorney, stating that default is entered and stating the reasons therefor. Once a default of any party has been duly filed or entered, that party shall not proceed with his case until his default has

been set aside by the court in accordance with sub-rule 520.4.

.2 Judgment. Judgment by default may be entered as follows:

(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall sign and enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not

an infant or incompetent person. The clerk shall not, unless by special order of the court, enter or record any judgment based on a note or other written evidence of indebtedness until such note or writing is first filed with him for cancellation.

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless repre-

sented in the action by a general guardian, guardian ad litem, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 7 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is

necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or other such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the constitution.

.3 Non-Military Affidavit.

Non-Military affidavits required by law shall be filed before entering any judgment in all actions and proceedings

in which the defendant has failed to appear.

.4 Setting aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 528. If personal service was made upon the party against whom the default was taken, it shall not be set aside unless application to have it set aside is made either before the entry of judgment or within 4 months after the default was regularly filed or entered except as provided in Rule 528. Any order setting aside such default shall be conditioned upon the party against whom the default was taken paying the taxable costs incurred by the other

party in reliance upon the default, except as prescribed in sub-rule 526.8. Other conditions may be imposed as the court deems proper. A proceeding to set aside default or a default judgment, except when grounded on want of jurisdiction over the defendant, shall be granted only if good cause is shown and an affidavit of facts showing a meritorious defense is filed.

.5 Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of sub-rule 518.3.

RULE 520.7 FORM OF DEFAULT.

STATE OF MICHIGAN

Circuit Court for the County of _____

_____)
(Name of Plaintiff))
)
VS.) DEFAULT
)
_____)
(Name of Defendant))

The default of _____,

_____ [1] _____ in the above named action is hereby entered for the reason that said _____ [1] _____ has failed to _____[2] _____ as appears from the attached affidavit[s] _____. [3]

_____[s]_____

[4]

[1] Plaintiff, Defendant, Third-Party Plaintiff, etc.

[2] Plead within the time prescribed by summons, served on _____; or defend.

[3] State facts in affidavit.

[4] Plaintiff, Defendant, etc.; or Attorney for Plaintiff, etc.

[Amended Dec. 2, 1963; July 13, 1965.]

GCR 528 MICHIGAN GENERAL COURT RULES

Rule 528. RELIEF FROM JUDGMENT OR ORDER.

.1 Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

.2 Defendant Not Personally Notified. Any defendant over whom per-

sonal jurisdiction was necessary and acquired but who did not in fact have knowledge of the pendency of the action may, at any time within 1 year after final judgment, enter his appearance, and if he shows reason justifying relief from the judgment and innocent third persons will not be prejudiced, the court may relieve him from the judgment, order, or proceedings as to which personal jurisdiction was necessary, on payment of such costs thereon or such creditors as the court deems just.

.3 Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. On motion and upon such terms as are just, the court may relieve a party or his legal repre-

sentative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under sub-rule 527.2; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason

justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than 1 year after the judgment order or proceeding was entered or taken. A motion under sub-rule 528.3 does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in sub-rule 528.2 above, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a

bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

GCR 313 MICHIGAN GENERAL COURT RULES

Rule 313. RUFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

.1 Refusal to Answer.

If a party or other deponent refuses to answer any question propounded upon oral examination, the examintion shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the county where the deposition is taken or to the court in which the action is pending for an order compelling the answer.

Upon the refusal of a deponent to answer any interrogatory submitted under Rule 307 or upon the refusal of

any party to answer any interrogatory submitted under Rule 309 the proponent of the question may on like notice make like application for such an order.

If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party or deponent and the party or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees.

If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party to pay to the refusing party or deponent the amount of the reasonable

expenses incurred in opposing the motion, including reasonable attorney's fees.

.2 Failure to Comply With Order.

(1) Contempt. If a party or other deponent refuses to be sworn or refuses to answer any question after being directed to do so by the court in the county in which the deposition is being taken or by the court in which the action is pending, the refusal may be considered a contempt of the court which made such order.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under sub-rule 313.1 requiring him to answer designated questions, or an order made under either Rule 310 or

311, the court may make such orders in regard to the refusal as are just, and among others the following:

(a) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the thing or land, or the contents of the paper, or the physical or mental or blood condition sought to be examined, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) An order refusing to allow the disobedient party to

support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of the physical or mental or blood condition sought to be examined;

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) For disobeying any order except an order to submit to a physical or mental or blood

examintion, a person may be considered in contempt of the court making the order, in lieu of or in addition to any of the foregoing orders.

(e) Where a party has failed to comply with an order under sub-rule 311.1 requiring him to produce another for examination, such orders as are listed in subdivisions (a), (b), and (c) of sub-rule 313.2(2), unless the party failing to comply shows that he is unable to produce such person for examination.

.3 Expenses on Refusal to Admit. If a party, after being served with a request under Rule 312 to admit the

genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matters of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of not substantial importance, the order shall be made.

.4 Failure of a Party to Attend or Serve Answers. If a party or officer or managing agent of a party willfully fails to appear before the person who

is to take his deposition, after being served with a proper notice or fails to serve answers to interrogatories submitted under Rule 309, after proper notice of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 37. REFUSAL TO MAKE DISCOVERY: CONSEQUENCES.

(a) Refusal to Answer. If a party or other deponent refuses to answer any question propounded upon oral examination, the examination shall be completed on other matters or adjourned, as the proponent of the question may prefer. Thereafter, on reasonable notice to all persons affected thereby, he may apply to the court in the district where the deposition is taken for an order compelling an answer. Upon the refusal of a deponent to answer any interrogatory submitted under Rule 31 or upon the refusal of a party to answer any interrogatory submitted under Rule 33,

the proponent of the question may on like notice make like application for such an order. If the motion is granted and if the court finds that the refusal was without substantial justification the court shall require the refusing party or depondent and the party or attorney advising the refusal or either of them to pay to the examining party the amount of the reasonable expenses incurred in obtaining the order, including reasonable attorney's fees. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party or the attorney advising the motion or both of them to pay to the refusing party or witness

the amount of the reasonable expenses incurred in opposing the motion, including reasonable attorney's fees.

(b) Failure to Comply with Order.

(1) Contempt. If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) Other Consequences. If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other

thing for inspection, copying or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action

in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

(c) Expenses on Refusal to Admit. If a party, after being served with a request under Rule 36 to admit the genuineness of any documents or the truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other

party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Failure of Party to Attend or Serve Answers. If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any

part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.

(f) Expenses Against United States. Expenses and attorney's fees are not to be imposed upon the United States under this rule. As amended Dec. 29, 1948, effective Oct. 20, 1949.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 55. DEFAULT

(a) Entry

When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) Judgment

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has

been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the

hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or other such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting aside default

For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

(d) Plaintiffs, counterclaimants, cross-claimants

The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitation sof Rule 54(c).

(e) Judgment against the United States

No judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes his claim or right to relief by evidence satisfactory to the court.

FEDERAL RULES OF CIVIL PROCEDURE

RULE 60. RELIEF FROM JUDGMENT OR ORDER.

(a) Clerical Mistakes

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; inadvertence;

excusable neglect; newly discovered evidence; fraud, etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based

has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28,

U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by independent action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948, eff. Oct. 20, 1949.)

MCLA

600.4011. Garnishment; jurisdiction; procedure; limitations

Jurisdiction

Sec. 4011. (1) Subject to the conditions in subsections (2), (3), (4), (5), (6) and (7) ***, the circuit court *** shall have power by garnishment to apply the following property or obligation, or both, to the satisfaction of a claim evidenced by contract, judgment of this state, or foreign judgment, whether or not the state has jurisdiction over the person against whom the claim is asserted:

(a) Personal property belonging to the person against whom the claim is

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asserted but which is in the possession or control of a third person if the third person is subject to the judicial jurisdiction of the state and the personal property to be applied is within the boundaries of this state.

(b) An obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state ***.

Rules; state and subdivisions as garnishee

(2) The court may exercise the jurisdiction granted in this section only if action is taken in accordance

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with rules adopted by the supreme court to protect the parties. Except as wise provided by court rule, the state of Michigan and every governmental unit therein, including but not limited to a public, municipal, quasi-municipal, or governmental corporation, unincorporated board, public body, or political subdivision, may be proceeded against as garnishees in the same manner and with like effect as indivduals.

Garnishment before judgment

(3) A writ of garnishment may be issued before judgment only as provided in this subsection. Upon ex parte application showing that the person against whom the claim is asserted is not subject to the judicial

jurisdiction of the state or, after diligent effort, cannot be served with process as required to subject him to the judicial jurisdiction of the state, a copy of the writ of garnishment shall be served upon the person against whom the claim is made in the same manner as provided by rules of the supreme court for service of process in other civil actions in which personal jurisdiction over the defendant is not requried. Upon rendition of judgment in the principal action, the obligation or property garnished shall be applied to the satisfaction of the judgment.

Against state or governmental unit; judgment

(4) A garnishment proceeding shall not be commenced against the

state of Michigan or any governmental unit therein, including but not limited to a public, municipal, quasi-municipal, or governmental, or governmental corporation, unincorporated board, public body, or political subdivision, until after the plaintiff's claim has been reduced to judgment.

Labor claim; judgment

(5) A garnshiment proceeding shall not be commenced against any person for money owing to a principal defendant on account of labor performed by the principal defendant until after the plaintiff's claim has been reduced to judgment.

Sheriff or other public officer

(6) A sheriff or other public officer is not subject to garnishment

for any money or things received or collected by him by virtue of an execution or other legal process in the favor of he principal defendant or because of any money in his hands for which he is accountable merely as a public officer to the principal defendant.

Forbidden by statute

(7) A garnishment proceeding shall not be commenced if he commencement of such a proceeding is forbidden by a statute of this state.

Amended by P.A. 1974, No. 371, § 1, Eff. April 1, 1975.